UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

CTS CONSTRUCTION, INC. Employer	:	Case No. 09-RD-187368
and	:	
JAMES D. MONAHAN II Petitioner	:	
and	:	**CTS CONSTRUCTION, INC.'S MOTION FOR RECONSIDERATION**
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, (CWA), LOCAL 4322 Union.	:	

Pursuant to 29 C.F.R. § 102.48 and any and all other provisions of the National Labor Relations Act (the "Act") which would afford relief, CTS Construction, Inc. ("CTS" or "Employer") respectfully requests that the National Labor Relations Board ("Board") reconsider its May 31, 2017, Order, and its July 26, 2017, Erratum, both of which denied the Employer's Request for Review of the Regional Director's administrative dismissal of the Petition for Decertification on November 17, 2016. *See* Order, Case No. 09-RD-187368, May 31, 2017, and Erratum, Case. No. 09-RD-187368, July 26, 2017, attached hereto as **Exhibit A**. CTS requests that the Board reconsider its Order and Erratum on the following grounds: (1) the Board made a material error by misapplying the *Poole* framework and relying on inaccurate information to establish that the parties did not bargain for a reasonable amount of time, and (2) even assuming that the parties did not bargain for a reasonable period of time, the Board and the Regional Director failed to hold a hearing to establish a causal nexus between the Petition for Decertification and the actions of the Employer, as set forth in *Saint Gobain Abrasives*. *See generally* 342 NLRB 434 (2004).

These grounds present extraordinary circumstances warranting reconsideration of the Board's May 31, 2017 Order. *See* Rs. & Regs. of NLRB § 102.48(d)(1) ("A party to a proceeding before the Board may, because of extraordinary circumstances move for reconsideration * * * after the Board's decision and order.").

I. FACTUAL BACKGROUND

A. The Employer's Business

CTS is a full-service telecommunications installation company that provides network and cabling services to customers throughout the Midwest and East Coast. Though headquartered in Southwestern Ohio, CTS's workforce of approximately 150 highly trained employees is extremely mobile and its employees travel throughout the country rather than working from a particular office location.

B. Collective Bargaining for a Successor Agreement

On February 10, 2016, the Communications Workers of America (the "Union") and CTS began the collective bargaining process for the purpose of entering into a successor collective bargaining agreement. Negotiations continued throughout the month. At the outset, neither party had many proposals to exchange, so both expected to reach an agreement before the collective bargaining agreement expired on February 28, 2016. Ultimately, however, the parties were unable to reach an agreement by the expiration date.

C. The Union's Unfair Labor Practice Charges

The contract expired on February 28, 2016. The bargaining that occurred prior to the expiration of the contract continued after its expiration. On or about April 27, 2016, a Petition for Decertification ("PD1") was filed. Approximately two weeks later, the Union filed several unfair labor practice charges concerning the bargaining process and alleged unlawful conduct related to

PD1. CTS denied these charges. The parties met on May 26, 2016, and resumed negotiations toward a successor contract. On June 2, 2016, CTS and the Union discussed dates for collective bargaining. On June 6, 2016, the Union filed several additional unfair labor practice charges alleging that CTS failed and refused to bargain in good faith with the Union during a June 1, 2016 bargaining session, and that CTS unlawfully participated in the decertification process by engaging in the following conduct: (1) soliciting a decertification petition; (2) providing improper assistance to at least one employee with respect to the collection of signatures; and (3) promising benefits to and threatening unit employees. CTS denied these charges. The parties continued to bargain in good faith throughout the summer via in-person meetings, telephone conference calls, and emails.

D. Bargaining, Settlement Agreement, and Posting Period

The parties met in person to bargain on September 13th and 14th. On September 15, the parties entered into a settlement agreement addressing all of the outstanding unfair labor practice charges that had been filed by the Union (the "Settlement Agreement"). On September 21, the parties met again for bargaining. The Regional Director approved the Settlement Agreement on September 23, 2016. The Settlement Agreement contains a non-admission clause and calls for a posting period of sixty (60) days, as well as a requirement that the parties meet and bargain. *See* Settlement Agreement, attached hereto as **Exhibit B.** PD1 was subsequently withdrawn. *See* NLRB Approval of Request to Withdraw Decertification Petition, attached hereto as **Exhibit C**. CTS did not violate the National Labor Relations Act ("Act") in any manner, but it agreed to settle the alleged unfair labor practice charges and continue bargaining in an effort to reach a global resolution. Inclusion of the non-admission clause was an integral part of the Settlement Agreement.

On October 4, 2016, CTS posted the required notice. In addition to posting the notice in its brick and mortar locations, CTS also mailed the notice to its employees' home addresses. CTS took this extra step because it understood that due to the nature of its business and the fact that the majority of employees perform their work off-site, many employees would not have occasion to be at the physical workplace to see the notice. Therefore, CTS ensured that all of its employees had access to the notice.

Thereafter, CTS was in full compliance with the Settlement Agreement, including the requirement of the parties to meet and bargain. In fact, the Union certified that CTS was fully compliant during the month of October 2016. *See* Certification of Compliance, attached hereto as **Exhibit D**. On October 25, 2016, the parties met for bargaining and reached a tentative agreement. On October 28, 2016, a CTS representative sent the Union the agreed-upon proposals. On October 31, 2016, the Union responded that it agreed with the proposals.

On November 1, 2016, CTS employee James Monahan ("Monahan") filed a Petition for Decertification ("PD2"). There is no indication that Monahan was involved with the filing of PD1. The Regional Director required CTS to submit a position statement regarding PD2 and CTS did so. Subsequently, the Regional Director, without holding a hearing or taking any evidence, dismissed PD2.

II. THE BOARD'S INITIAL DECISION

A. The Majority Opinion (Mark Gaston Pearce and Lauren McFerran)

In its initial decision, the majority found that CTS did not raise a substantial issue warranting review. Although the Board conceded that the Regional Director did not specifically discuss the relevant factors under *Poole,* it determined that the Regional Director's decision was at least consistent with *Poole*. In a footnote, the majority reasoned: "The short amount of time

elapsed since the commencement of bargaining, the number of bargaining sessions, the fact that the parties were on the cusp of finalizing an agreement, and the absence of a bargaining impasse *clearly* outweigh any other factors which might suggest that a reasonable period of time to bargain had elapsed." *CTS Constr., Inc.*, 2017 NLRB LEXIS 290, n. 1 (N.L.R.B., May 31, 2017) (emphasis added). In reaching this conclusion, the majority noted that the parties met only once after executing the Settlement Agreement. The majority also found that two factors – "whether the parties were bargaining for an initial agreement and the complexity of the issues being negotiated" – weighed in favor of CTS. *Id.* Nonetheless, the majority denied CTS's Request for Review. *Id.*

B. <u>The Dissenting Opinion (Philip A. Miscimarra)</u>

In his dissent, Chairman Miscimarra vigorously contended that the Regional Director, and in turn, the majority, "fundamentally erred" in failing to consider whether the parties reached a tentative agreement. *Id.* at *3. Chairman Miscimarra further stated that the parties had essentially reached an agreement only contingent upon ratification. Thus, the parties had, by definition, bargained for a reasonable amount of time. *Id.* As a result, the Chairman would have found that the *Poole* factors weighed in favor of CTS, warranting review of the Regional Director's decision. *Id.* As a final consideration, Chairman Miscimarra expressed concerns that refusing to process the Petition for Decertification would deprive employees of their right to challenge representation for up to three years because of the contract bar doctrine. *Id.* at *4. Accordingly, Chairman Miscimarra would have granted CTS's Request for Review. *Id.*

C. <u>The Erratum</u>

In its July 26, 2017, Erratum, the Board noted that it failed to rule on Monahan's Request for Review of the Regional Director's administrative dismissal. Accordingly, the Board held that Monahan's request for review was denied. No further analysis was provided.

III. STANDARD OF REVIEW

Pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations, a party may move for reconsideration because of extraordinary circumstances. 29 C.F.R. § 102.48(c). In moving for reconsideration of a Board's decision, the party must "state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied upon. 29 C.F.R. § 102.48(c).

IV. THE BOARD MADE A MATERIAL ERROR BY RELYING UPON ERRONEOUS INFORMATION AND MISAPPLYING THE *POOLE* FRAMEWORK TO ESTABLISH THAT THE PARTIES DID NOT BARGAIN FOR A REASONABLE AMOUNT OF TIME.

The Board's reliance on erroneous information and its misapplication of the *Poole* framework present extraordinary circumstances warranting reconsideration of its May 31, 2017 Order and its July 26, 2017 Erratum. In determining that CTS did not bargain with the Union for a reasonable period of time after reaching a settlement, the majority erroneously applied the factors established by *Poole* and its progeny, which include: (1) whether parties were bargaining for an initial agreement; (2) the complexity of the issues negotiated and the parties' bargaining procedures; (3) the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties were to agreement; and (5) the presence or absence of a bargaining impasse. *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951); *see also AT Systems West, Inc.*, 341 NLRB 57, 61 (1989) (citing *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002)).

The improper application of a framework is a material error that constitutes extraordinary circumstances supporting a grant of a motion for reconsideration. *William Wolf Bakery, Inc.*, 122 NLRB No. 89, 2 (1958). Importantly, the Board does not mandate a specific amount of time within

which the parties must bargain in good faith after executing a settlement agreement. Rather, the Board requires the period be "reasonable" given the Union's request. *Poole,* 95 NLRB at 50. In determining what is "reasonable" under the circumstances, the Board reviews and considers all of the interactions between the parties during the relevant period of time rather than solely considering the length of time that elapsed. *King Scoopers, Inc.*, 295 NLRB 35, 37 (1989). The determination of a reasonable time for bargaining is fact-sensitive and varies from case to case. *Lee Lumber,* 334 NLRB at 399.

When an employer refuses to bargain at all after entering into a settlement agreement, a "reasonable time period" of bargaining cannot be said to have passed. *Poole*, 95 NLRB at 41. For example, in *Poole,* the Board found that dismissal of a decertification petition was proper because the employer refused entirely to bargain with the Union after entering into a settlement agreement. *Id.* Thus, because the employer did not bargain with the Union at all, the bargaining provision in the settlement agreement could not achieve its purpose. *Id.* Therefore, dismissal was proper. *Id.*

Similarly, in *AT Systems West,* the Board found that the employer failed to bargain for a reasonable period of time following a settlement agreement. 341 NLRB at 62. The parties were negotiating their first contract and the issues that were the subject of bargaining were quite complex given it was the first contract. *Id.* at 61. Although the parties had been in negotiations for seventeen months, the Board reasoned that since the employer engaged in unfair labor practices during this period, it could not find that that the parties were at a virtual impasse. *Id.* Although the parties had interacted to some extent after the settlement agreement, not much progress was made in terms of coming to an agreement, as there were still issues with each of the facilities that were the subject of the bargaining. *Id.* Therefore, in applying the factors set forth in *Lee Lumber*, the Board found that a reasonable amount of time had not passed. *Id.*; *accord.*, *King Scoopers, Inc.*,

295 NLRB 35, 38 (reasonable period of time had not passed when the parties did not meet face-to-face over a four-month period and there was no bargaining impasse).

The facts of this case are far different from those outlined above. Here, unlike in *AT Systems West*, the parties were not bargaining for an initial agreement, but instead were bargaining for a successor agreement. Because the parties were bargaining for a successor agreement, they did not require the same amount of time to bargain as they would have needed had they been engaged in bargaining for an initial agreement. Both CTS and the Union initiated negotiations several weeks before the prior agreement was set to expire, which suggests a strong working relationship between the parties and the expectation and confidence that a deal could be completed. This factor weighs strongly in favor of CTS.

Concerning the complexity of the issues negotiated and the parties' bargaining procedures, the issues negotiated in this case – wages – were not complex. Unlike the bargaining issues in *AT Systems West*, which involved first contract complexities, the wage issues in this case were not complex and did not necessitate a longer period of time to be reasonable under the circumstances. As previously outlined, the parties possessed a strong working relationship and had been operating under an existing agreement for some time; as such, they required less time to come to a successor agreement on the issue of wages. This factor weighs strongly in favor of CTS.

The third factor – the amount of time elapsed since the commencement of bargaining and the number of bargaining sessions – also weighs in favor of CTS. The petition was filed thirty-four days after the Settlement Agreement was reached. While one month may seem like a short period of time, the Board must look at the totality of the circumstances surrounding the negotiations and the relationship between CTS and the Union. In February, 2016, the bargaining partners found it feasible that a successor agreement could be reached within a matter of a few

weeks, as evidenced by negotiations starting with only eighteen days left under the previous agreement. This is well within the thirty-four-day period after the petition was filed. The parties reasonably expected to reach a resolution of their differences and reach an agreement within that time period. Further, as established by this Board's precedent, the matters and undertakings accomplished within a particular timeframe are far more important considerations than the length of the timeframe itself.

Moreover, the Board relied upon erroneous information to conclude that this factor weighed in favor of the Union. In its initial decision, the majority was persuaded to rule against CTS on the basis that only one bargaining session took place between the parties. This is inaccurate. While CTS only met once with the Union after the execution of the Settlement Agreement, CTS bargained in good faith with the Union from February 2016 through the summer of 2016 through phone calls and emails, and met in-person on three separate occasions before the Settlement Agreement, despite the pending unfair labor practice charges levied against CTS. This pattern and practice of negotiating in good faith was ongoing, and CTS was willing to settle the charges to continue to bargain. CTS met with the Union again after the Settlement Agreement to continue bargaining. CTS made conscious good-faith efforts to bargain with the Union from February 2016 right up until October 31, 2016, when the Union notified CTS that it agreed to the proposals. Surely a blind-eye cannot be turned to the fact that CTS was working to reach an agreement with the Union for the better part of nine months because only one face-to-face session took place *after* the Settlement Agreement. Under the circumstances, the third factor weighs in favor of CTS.

The fourth factor concerning the amount of progress made in negotiations and how near the parties were to an agreement also weighs in favor of CTS. This factor may be the most

important in establishing when a reasonable amount of time has passed for the parties to bargain in good faith. In the Board's initial decision, the majority noted that "the Board has long declined to hold that a reasonable period of bargaining has elapsed in situations where parties were on the cusp of finalizing an agreement." *CTS Constr., Inc.* 2017 NLRB LEXIS at n.1. In justifying this rule, the Board cited *Americold Logistics, LLC*, which surveyed previous decisions where parties were close to an agreement and the Board found that a reasonable time had not passed. 362 NLRB No. 58, 6 (2016). However, these cases are distinguishable from the situation at hand. In both *Ford Center Performing Arts,* 328 NLRB 1, 2 (1998) and *N.J. MacDonald & Sons, Inc.*, 155 NLRB No. 72, 2 (2011), cases cited under *Americold*, "cusp of the agreement" findings were warranted because there were issues remaining between the parties. In this case, however, no issues remained and the proposals had been accepted by both sides. The parties were not "on the cusp" of an agreement – they had an agreement, subject only to ratification by the Union itself.

On October 28, 2016, CTS sent the agreed upon proposals to the Union. On October 31, 2016, the Union notified CTS that it agreed to the proposals, subject to a ratification vote. As the dissenting opinion to the initial decision stated, while quoting *Poole*, "A settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time *in which to conclude a contract*." *CTS Constr., Inc.* 2017 NLRB LEXIS at 3 (citing *Poole*, 95 NLRB at 36 (emphasis added)). In this case, the parties reached a tentative agreement. As such, there were no outstanding issues, bargaining, or revisions required. All that was needed was a ratification vote by the members. If this is not evidence of a reasonable amount of time to reach an agreement, then the only evidence of a reasonable amount of time to reach an agreement will be when the parties actually execute the agreement. This precedent would allow unions to put off ratification votes and prevent disgruntled members from filing petitions

simply because the agreement has not been officially finalized, despite agreement by the parties and a reasonable period of time passing. In the Board's initial decision, the majority found that the parties nearly reaching an agreement was not evidence of a reasonable amount of time to bargain. As the dissent so artfully stated, "Once… an agreement is reached, the Union cannot possibly establish that further bargaining is required." *Id.* at 4. In other words, once an agreement is reached, there are no outstanding issues remaining for the parties to bargain. Thus, not only did a reasonable time for bargaining pass, the time for bargaining was over. Therefore, this factor too, weighs in favor of CTS.

The final factor – the presence or absence of a bargaining impasse – weighs in favor of CTS. The parties had already reached an agreement, so they were not at an impasse. Harkening back to the fourth factor, the fact that CTS and the Union had reached an agreement is strong evidence that reasonable time was afforded for bargaining.

Based on a thorough analysis of the *Poole* factors, the initial decision by the Board was erroneous because the parties were bargaining for a successor agreement, the parties had met on numerous occasions over the span of nine months, sufficient time had elapsed from the commencement of bargaining, and the parties not only made progress, but they reached an agreement. Therefore, the factors set forth by *Lee Lumber* under the *Poole* framework weigh in favor of CTS. The Board's finding that a reasonable time for bargaining under the Settlement Agreement had not passed was a material error that constitutes extraordinary circumstances. Accordingly, the Board should grant this motion for reconsideration of the dismissal of PD2.

V. THE BOARD AND REGIONAL DIRECTOR FAILED TO CONDUCT A HEARING ON CAUSATION, AS REQUIRED BY *SAINT GOBAIN*.

Alternatively, if the Board finds that the parties had failed to bargain for a reasonable period of time when PD2 was filed, the Board and the Regional Director deprived CTS's employees of

their section 7 rights under the Act by deciding to dismiss PD2 without a hearing. Section 7 provides employees the right to refrain from union representation, and the Act gives employees the right to a decertification election. 29 U.S.C. § 157; *see also* 29 U.S.C. § 159(c)(1)(A)(ii).

Before blocking a decertification petition because of an action by an employer, there must be a hearing to establish a causal nexus between the petition and the action of the employer. *Saint Gobain Abrasives*, 342 NLRB 434 (2004). For example, in *Saint Gobain*, the Regional Director dismissed a decertification petition because the employer's alleged failure to bargain in good faith tainted the filing of the petition. 342 NLRB at 434. The Regional Director dismissed the petition without holding a hearing to determine if there was a nexus between the employer's actions and the filing of the petition. *Id.* After the Regional Director's decision, the Board reversed and ordered a hearing on the nexus between the employer's actions and the petition. *Id.* The Board provided: "[I]t is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. Surely, a hearing and findings are prerequisites to such a denial." *Id.* Finally, the Board noted that neither it nor the Regional Director could rely on charges that were informally settled since those charges were unproven. *Id.* Accordingly, the Board reversed the dismissal of the decertification petition, reinstated the petition, and remanded the case to the Regional Director. *Id.*

This case falls directly within the scope of *Saint Gobain.* The instant Petition for Decertification was dismissed without a hearing to determine whether a nexus exists between CTS's actions and the filing of the Petition for Decertification. Moreover, the unfair labor practice charges against CTS were adamantly denied, unproven, and settled with a non-admissions clause. Yet, the Regional Director dismissed PD2. Although the majority in the Board's initial decision

clings to an apparent bright line rule that no decertification petition can be filed until after a reasonable time for bargaining between the parties has passed after a notice posting, the Board should engage in a case-by-case analysis, as Chairman Miscimarra noted in his dissent. This practice is followed to allow the bargaining provision within the settlement agreement to be effective.

Adhering to a bright line rule without holding a hearing pursuant to *Saint Gobain* to establish that CTS's lack of good-faith bargaining was causally connected to the filing of PD2 would be in stark contrast to the purpose of the Act and a violation of the employees' Section 7 rights. The employees' right to choose is paramount to the meaning of the Act. Thus, it is imperative that when a petition is dismissed, a hearing be a "prerequisite to a denial." By allowing a dismissal absent a hearing, the Board would prevent employees with legitimate concerns about their representation from filing petitions simply because an arbitrary period of time had not passed since an unrelated settlement agreement took place between their employer and their union.

Further, when the contract bar doctrine is taken into consideration, this case, and others similarly situated, would result in employees being unable to question their representation for a "reasonable time" after the commencement of bargaining–which, if the majority decision stands, would be until an agreement is finalized. In situations like the instant case, this type of analysis means that employees who are unhappy with their bargaining representative would need to wait another three years to exercise their rights on this issue. A decision that does not permit employees to question their representation for a period of several years is in stark contrast with the purpose of the Act and the protection of worker rights.

Therefore, assuming that a reasonable time for bargaining was not permitted before the filing of the petition, a hearing pursuant to *Saint Gobain* should have been conducted as to the

causation between the filing of the petition and the lack of a reasonable time for bargaining. Otherwise, CTS's employees will be stripped of their Section 7 rights, without any recourse.

VI. CONCLUSION

This case presents extraordinary circumstances that warrant the Board's reconsideration of its May 31, 2017, Order and July 26, 2017, Erratum. The Board's Order does not comply with the framework outlined in *Poole* to establish whether the parties bargained for a reasonable amount of time and it relies upon erroneous information in applying and weighing the *Poole* factors. Alternatively, assuming that there was not a reasonable time to bargain, the Board and the Regional Director failed to hold a hearing to establish a causal nexus between the PD2 and the actions of CTS as set forth in *Saint Gobain*. Accordingly, CTS respectfully requests that the Board: (1) grant this Motion for Reconsideration, (2) reinstate PD2, and (3) direct the Regional Director to issue a decision in line with this Board's analysis of the *Poole* factors. Alternatively, CTS requests that the Board direct that a hearing on the issue of causation be held.

CERTIFICATE OF SERVICE

Pursuant to the Board's Rules and Regulations §§ 102.67(f) and (i)(2), the undersigned hereby certifies that its Motion for Reconsideration was filed electronically with the Office of the Executive Secretary on July 31, 2017. A copy of that filing has been sent to the following individuals via email:

Bradley C. Smith, Flanagan Lieberman Hoffman & Swaim, 15 W. Fourth Street, Suite 100, Dayton, Ohio 45402, bsmith@ flhslaw.com.

Matthew R. Harris, Esq., CWA District 4 Counsel, 20525 Center Ridge Rd., Suite 700, Cleveland, Ohio 44116, mrharris@cwa-union.org.

s/ Jeffrey A. Mullins
Jeffrey A. Mullins

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CTS CONSTRUCTION, INC.
Employer

and Case 09-RD-187368

JAMES D. MONAHAN II
Petitioner
and

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, (CWA), LOCAL 4322
Union

ORDER

The Employer's Request for Review of the Regional Director's administrative dismissal of the petition is denied as it raises no substantial issues warranting review.[1]

[1] Although the Regional Director did not specifically discuss each of the relevant factors under *Poole Foundry* when assessing whether the parties had bargained for a reasonable period of time when the instant petition was filed, we find that his analysis and conclusions are consistent with *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952), and its progeny. Under *Poole Foundry*, the relevant factors are: "whether the parties were bargaining for an initial agreement, the complexity of the issues being negotiated and the parties' bargaining procedures, the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions, the amount of progress made in negotiations and how near the parties were to agreement, and the presence or absence of a bargaining impasse." *AT Systems West, Inc*., 341 NLRB 57, 61 (1989) (citing *Lee Lumber & Building Material Corp*., 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002)). The first two factors - whether the parties were bargaining for an initial agreement and the complexity of the issues being negotiated - weigh in favor of finding that a reasonable period of time to bargain had elapsed. However, all of the remaining factors support the opposite conclusion. The petition in this case was filed only 34 days after the parties entered into a settlement agreement requiring the Employer to post a remedial notice for 60 days and bargain with the Union "until agreement or lawful impasse is reached or until the parties agree to a respite in bargaining." Further, the parties met only one time after the settlement agreement was executed. They made substantial progress in that bargaining session and reached a tentative agreement, conditioned on ratification. "[T]he Board has long declined to hold that a reasonable period for bargaining has elapsed in situations where parties were on the cusp of finalizing an agreement." *Americold Logistics, LLC,* 362 NLRB No. 58, slip op. at 5 (2015) (finding that reasonable period for

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., May 31, 2017

Chairman Miscimarra, dissenting:

In this case, my colleagues find that the Regional Director properly dismissed a decertification petition filed five weeks after the Employer and the Union entered into a settlement agreement that included a bargaining provision. Contrary to my colleagues, I believe that the Requests for Review raise substantial issues warranting review with respect to this action.

On February 10, 2016,[1] the Employer and Union began bargaining for a successor collective-bargaining agreement but were unable to reach agreement prior to the expiration of their contract on February 28. On or about April 27, an employee filed a decertification petition. The Union immediately filed unfair labor practice charges alleging that the Employer had not bargained in good faith and had aided the decertification petition, and requested that the Region block the petition. On May 2, the Regional Director granted the Union's blocking request; the petition was voluntarily withdrawn on September 8.

On September 23, the Employer and Union entered into a settlement agreement whereby the Employer was required to post a remedial notice for 60 days and bargain with the Union for a minimum of 18 hours per month over several six-hour sessions. The settlement agreement provided that bargaining would continue until the parties reached agreement, lawful impasse, or until the parties agreed to a break in bargaining. The Employer posted the notice on October 4, and the parties scheduled their first bargaining session for October 25. Although not mentioned

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bargaining had not elapsed where parties had "finalized a written agreement" and the union had scheduled a ratification vote). See also *Lee Lumber*, 334 NLRB at 404 ("One of the best indicators of success in collective bargaining is reaching a contract. When negotiations have nearly produced a contract, it is reasonable that the parties should have some extra time in which to attempt to conclude an agreement."). The short amount of time elapsed since the commencement of bargaining, the number of bargaining sessions, the fact that the parties were on the cusp of finalizing an agreement, and the absence of a bargaining impasse clearly outweigh any other factors which might suggest that a reasonable period of time to bargain had elapsed.

Member McFerran notes that the dismissal of the petition is also consistent with *Hertz Equipment Rental Corp.*, 328 NLRB 28 (1999), where the Board applied the rule that no question concerning representation can be raised during the posting period of a settlement agreement.

[1] All dates are in 2016 unless stated otherwise.

by the Regional Director, the Requests for Review indicate that the Employer and Union reached a tentative agreement on October 25, which was reduced to writing and submitted to the Union on October 28 and agreed to by the Union subject to a planned ratification vote.[2] The Employer's Request for Review further indicates that the principal issue negotiated was wages. On November 1, the Petitioner filed the instant decertification petition, which the Regional Director summarily dismissed on the grounds that the parties had not been afforded a reasonable period of time to bargain following the settlement agreement. The Regional Director reasoned that the petition was filed after the execution and approval of the settlement agreement, within the 60-day notice posting period, and just seven days after the parties' first post-settlement negotiating session.

Under the Board's settlement bar doctrine, as stated in *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), and its progeny, an employer that enters into a settlement agreement requiring it to bargain with a union must bargain for a reasonable period of time before the union's majority status can be questioned. In deciding whether the parties have bargained for a reasonable period of time, the Board considers the following five factors: whether the parties were bargaining for an initial agreement; the complexity of the issues negotiated and the parties' bargaining procedures; the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions; the amount of progress made in negotiations and how near the parties were to agreement; and the presence or absence of a bargaining impasse. *AT Systems West, Inc.*, 341 NLRB 57, 61 (1989) (citing *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002)).

I believe that the Requests for Review have raised substantial issues regarding the Regional Director's application of *Poole.* As indicated above, the Regional Director only considered the amount of time that had elapsed since the settlement agreement was executed. Thus, the Regional Director gave no weight to the fact that the parties were not negotiating an initial contract, a factor that favors processing the petition under *Poole*. The Regional Director also gave no consideration to the complexity of the issues negotiated, as *Poole* requires. As noted, the Employer's Request for Review indicates that the issues were not complex. And the Regional Director fundamentally erred in failing to consider whether, as the Requests for Review indicate, the parties have reached a tentative agreement. As the Board stated in *Poole*, "a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time *in which to conclude a contract*." 95 NLRB at 36 (emphasis added). If, as the Requests for Review assert, the parties reached a tentative agreement, then the settlement agreement has *already* accomplished its purpose and the decertification petition should be processed.

My colleagues acknowledge, contrary to the Regional Director, that the first two *Poole* factors – whether the parties were negotiating an initial contract and whether the issues being negotiated are complex—weigh in favor of finding that a reasonable period of time to bargain *has* elapsed. But they contend that the remaining *Poole* factors require a finding that no such

[2] The Union's brief in opposition to the Requests for Review does not dispute the existence of a tentative agreement.

reasonable period has passed. In particular, they contend that the fact that the parties were "on the cusp of finalizing an agreement" indicates that a reasonable period of time for bargaining has not elapsed. I respectfully disagree.

As discussed at the outset, the Employer and Union apparently reached a tentative agreement on a successor collective-bargaining agreement on the day of their first scheduled bargaining session. This agreement was allegedly contingent only on ratification by the Union; there is no indication that it was contingent on further bargaining, or agreement, on any other matters. In these circumstances, I believe that the majority errs in finding that the parties were merely "on the cusp of finalizing an agreement." To the contrary, they had reached an agreement, subject only to ratification by the Union's members, and concluded negotiations.[3] To the extent that such an agreement exists, a reasonable period for bargaining must necessarily have elapsed. See *Americold Logistics, LLC*, 362 NLRB No. 58, slip op. at 12 (2015) (Member Miscimarra, dissenting) (finding that a decertification petition should be processed because a reasonable period of time for bargaining had elapsed at the point the parties signed an agreement).[4] As I explained in *Americold Logistics*, this conclusion is compelled by Section 8(d) of the Act, which defines the duty to "bargain collectively" as "the *performance* of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times* and *confer in good faith* . . . and the *execution of a written contract incorporating any agreement reached* if requested by either party" (emphasis added). Once such an agreement is reached, the Union cannot possibly establish that further bargaining is required. Id.[5]

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[3] It may be the case that the parties' agreement did not satisfy the Board's contract bar standards at that time, but this circumstance, even if true, has no bearing on whether the *Poole* factors support processing the petition.

[4] See also *King Soopers, Inc.*, 295 NLRB 35, 37 (1989) (internal citation omitted) (Board should focus on "what transpires during the time period under scrutiny rather than the length of time elapsed").

[5] Particularly in these circumstances, the Regional Director erred insofar as he relied on the fact that the petition was filed during the notice-posting period for the settlement agreement. In *Hertz Equipment Rental Corp.,* 328 NLRB 28 (1999), a Board majority, over a dissent by former Member Brame, stated that no question concerning representation can be raised during the notice-posting period. But the Board majority offered no justification for its view other than citing to *Freedom WLNE-TV,* 295 NLRB 634 (1989), a case that offers no support for the per se rule *Hertz* espouses. Instead, the Board found a settlement bar in *Freedom WLNE-TV* because there had been no post-settlement bargaining prior to the filing of a decertification petition. Here, there was not only post-settlement bargaining but, according to the Requests for Review, a post-settlement agreement.

Consistent with Member Brame's dissent in *Hertz Equipment*, supra, I believe that the Board should engage in a "case-by-case analysis" of decertification petitions rather than applying "an automatic dismissal [rule that] fails to consider the Sec[.] 7 rights of [] employees." Such individualized attention is particularly important in cases such as this where the parties have reached a tentative agreement and there is a history of decertification attempts.

Furthermore, as in *Americold Logistics*, supra, I find that the Board's refusal to process this petition unjustifiably denies the employees the opportunity to express their wishes concerning continued representation. As noted above, a prior decertification petition was blocked by charges filed by the Union that were resolved by a settlement agreement. If the instant decertification petition is not processed, and the Employer and Union execute a written agreement that satisfies the requirements of the contract bar doctrine, the employees will be denied that opportunity for an additional period of up to three years. See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). I believe the instant case illustrates the fact that the Board's blocking charge doctrine results in unfairness to the parties and, in the circumstances presented here, does violence to the Act's basic charge that the Board "in each case" ensure parties have "the fullest freedom in exercising the rights guaranteed by [the] Act." Sec. 9(b). I continue to favor reconsideration of the Board's blocking charge doctrine for the reasons expressed in the dissenting views that were contained within the Board's representation election rule, 79 Fed. Reg. 74308, at 74430-74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson).

For these reasons, I respectfully dissent.

PHILIP A. MISCIMARRA, CHAIRMAN,

To: Bradley C. Smith, Esq.
Matthew R. Harris
Jeffrey A. Mullins, Esq.
James D. Monahan II
Dan Frazier
Rick Setzer
Region 9
J. Emetu, Esq.
M. Denholm, Esq.

Attached is a Board Erratum in above-subject case.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CTS CONSTRUCTION, INC.
Employer

and Case 09-RD-187368

JAMES D. MONAHAN II
Petitioner

and

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, (CWA), LOCAL 4322
Union

ERRATUM

The Order that issued on May 31, 2017, failed to include that the Petitioner's Request for Review of the Regional Director's administrative dismissal of the petition is also denied. Accordingly, both the Employer's and Petitioner's requests for review are denied.

Dated, Washington, D.C., July 26, 2017.

/s/ Farah Z. Qureshi
Associate Executive Secretary

Exhibit B

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

CTS CONSTRUCTION, INC.

Cases 09-CA-175155, 09-CA-177652
09-CA-177660, 09-CA-177687
09-CA-182889

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:**

POSTING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and immediately post them in conspicuous places at its facility at 6661 Corporate Drive, Cincinnati, Ohio 45242 and any other locations where Charged Party typically posts notices to employees. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting.

MAILING OF NOTICES — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notices to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then also copy and mail, at its own expense, a copy of the attached Notice to all current or former employees who were employed at any time since February 28, 2016. Those Notices will be signed by a responsible official of the Charged Party and show the date of mailing. The Charged Party will provide the Regional Director written confirmation of the date of mailing and a list of names and addresses of employees to whom the Notices were mailed.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSION: By entering into this Agreement the Charged Party does not admit to any violation of the Act.

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), including all allegations covered by the attached Notice to Employees made part of this agreement, and does not settle any other case(s) or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act; the Regional Director may approve the settlement agreement and decline to issue or reissue a complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes /s/ JAM No

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a Complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned case(s) provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

Charged Party **CTS CONSTRUCTION, INC.**		**Charging Party** **Communications Workers of Americe, Local 4322, AFL-CIO-CLC**	
By: Name and Title	Date	By: Name and Title	Date
/s/ Jeffrey A. Mullins, Attorney Jeffrey Mullins, Attorney at Law Charged Party	9/15/2016	/s/ Matthew Harris CWA D4 Counsel Matthew Harris Attorney at Law Charging Party	9/15/2016
Recommended By:	Date	Approved By:	Date
/s/ Kevin P. Luken Kevin P. Luken Field Attorney	9/23/2016	/s/ Garey Edward Lindsay Regional Director, Region 9	9/23/2016

Exhibit C

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlrb.gov
Telephone: (513)684-3686
Fax: (513)684-3946

September 8, 2016

Douglas C. Anspach Jr., Attorney
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Columbus, OH 43215-3708

Re: CTS CONSTRUCTION, INC.
Case 09-RD-174948

Gentlemen:

This is to advise you that the Petitioner's request to withdraw the petition in the above case has been approved. Please be further advised that the case is closed on our records.

Very truly yours,

Garey Edward Lindsay
Regional Director

cc: Tim Ely, Vice President, CTS Construction, Inc., 3055 Crescentville Road
Cincinnati, OH 45235

Daniel D Frazier, President, Communications Workers of America,
Local 4322, AFL-CIO, CLC, 5030 Linden Ave., Dayton, OH 45432-1866

Craig Fisher, United States Postal Service, Cincinnati NDC,
20525 Center Ridge Road, Suite 700, Cleveland, OH 44116

Exhibit D

CERTIFICATION OF COMPLIANCE
(PART TWO)

RE: CTS CONSTRUCTION, INC.
Cases 09-CA-175155, et al.

Bargaining

On (date) September 8, 2016, the Union requested bargaining as provided for in the Settlement and referenced in the Notice to Employees; and

On (date) October 1, 2016, the parties agreed to meet on (dates) October 25th and 27th, 2016, for bargaining.

Periodically provide the Region with written updates on the progress of negotiations.

I have completed this Certification of Compliance and state under penalty of perjury that it is true and correct.

CHARGED PARTY/RESPONDENT

By: Jolette McQuinn

Title: VP H.R.

Date: 10/25/16

This form should be returned to the Compliance Officer. If the Certification of Compliance form Part Two and signed Notices are returned via e-file or e-mail, no hard copy of the Certification of Compliance Part Two are required.

*See Attached emails between CWA and CTS which confirm that these two dates will satisfy the bargaining requirements of the Settlement Agreement for October of 2016.